Supreme Court, U.S.
FILED
JUL 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1885

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MITCHELL RAY LEONARD, PETITIONER

V.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF ON MOTION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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PETITION FOR CERTIORARI
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PETITIONER'S RESPONSE ON A
WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

We have argued that Petitioner is entitled to Certiorari review in order to determine if 18 U.S.C. 924(e) was appropriately applied to him in this matter. At least three separate definitions of "burglary" are presently in use among the various Circuit Courts. At least two cases have suggested that the state law definition should be controlling.[1] Two have argued that the

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[1]See United States v. Portwood, 857

common law definition of burglary is appropriate given the manner that the statute was drafted.[2] While three others have held that a definition broader than that found at common law should be adopted for application of Section 924(e).[3] We have argued that this conflict among the Circuit Courts provides a proper basis for United States Supreme Court review. Review on this issue was not ripe until this matter entered the Supreme Court arena because such an argument would have no merit at

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F.2d 1221 (8th Cir. 1988); United States v. Dickerson, 857 F.2d 414 (7th Cir. 1988).

[2]See United States v. Chatman, 869 F.2d 525 (9th Cir. 1989); United States v. Headspeth, 852 F.2d 753 (4th Cir. 1988).

[3]See United States v. Dombrowski, No. 88-2545 (7th Cir. June 7, 1989, slip op. 19-20); United States v. Palmer, 871 F.2d 1202 (3rd Cir. 1989); United States v. Hill, 863 F.2d 1575 (11th Cir. 1989).

that Intermediate Appellate Court stage. We would urge that the Court adopt this common law criteria as the appropriate definition in this matter.

The Respondents argue that Petitioner should have raised the issue of whether "burglary" under Section 924(e) is limited to its common law definition at an earlier stage in these proceedings and that by failing to do so, Petitioner has waived resort to this argument. Petitioner would argue in response that this issue was not ripe at the time of the Fifth Circuit Appeal. The decision in United States v. Chatman, 869 F.2d 525 (9th Cir. 1989) adopting the common law definition as the appropriate definition for sentence enhancement pursuant to Section 924(e) had not been rendered at

the time that Petitioner's Fifth Circuit Reply Brief was filed.[1] Petitioner would therefore argue that recent case decisions provide Petitioner with the opportunity to raise this issue and bring it forth at this time. Furthermore, as respondent raised the issue of the Headspeth precedent in their Fifth Circuit Brief, they cannot assert that they are surprised by this issue at this time. Furthermore, the rules and procedures of the Supreme Court clearly recognize the ability of both Petitioners and Respondents to bring forth new cases and new arguments even during the actual Certiorari proceedings. Therefore, we would respectfully request that the Court accept this matter for consideration. We

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[1]Indeed, the decision would not be rendered until four months later. While Petitioner concedes that the United States v. Headspeth, 852 F.2d 753 (4th

contend that an argument based upon diversity of opinion among the Circuits is appropriately presented in a Writ to the Supreme Court.

Respondent's argument that this case does not present an appropriate vehicle for review should fail because an argument based upon diversity among the Circuits would not be ripe at the Intermediate Appellate stage. The Intermediate Appellate Court has no means of remedying divergent application of Section 924(e). Only at the Supreme Court level can this diversity be

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Cir. 1988) precedent was available at the time that Fifth Circuit Brief's were submitted, that lone precedent was not significantly compelling at that time. The combination of the Headspeth and Chatman cases do appear to provide sufficient precedent to suggest that a reviewable conflict exists at this time.

addressed. This is why at the Intermediate Appellate stage Petitioner's arguments addressed what definition of burglary should be properly applied to him, rather than concentrating on diversity among the Circuits. Making such an argument at the Intermediate Appellate level is inappropriate and taxing judicial economy.

We would argue that perhaps the best explanation for the divergence in opinions among the Circuits centers around the actual fact situations involved in each of these circumstances. We would point out that in those circumstances where the facts presented criminals whose sentences enhancement was based on less violent or less criminal activity, those courts have held that a

common law definition should be applied. In those instances, those courts were attempting to apply the statute as it was worded in order to include within its gamut only those individuals who were the sort of violent habitual offenders actually anticipated by the Congressmen who enacted the statute. By strictly adhering to the language of the statute, they were adopting an "equity" interpretation.

The Fourth Circuit, in United States v. Headspeth, 852 F.2d 753, 765 (4th Cir. 1988), considered whether a defendant's prior convictions for storehouse breaking constituted burglary as contemplated by Section 924(e). The Fourth Circuit held that this offense was not of the seriousness or violence sufficient to

support sentence enhancement. The court noted that:

> Quite plainly, this offense is not the sort of "violent felony" referred to in § 924(e)(2)(B)(i), for it does not have as an element the use - actual, attempted, or threatened - of force against the person.

The Ninth Circuit, in United States v. Chatman, 869 F.2d 525, 528 (9th Cir. 1989), concluded that the overwhelming impression created by 924(e) indicated that "Congress intended 'burglary' to be a crime of particular danger to the person, and not to include all of the common property offenses that states might choose to denominate as burglary." This case held that "auto burglary" was not sufficient to sustain sentence enhancement pursuant to the Armed Career Criminals Act. The Chatman court went on to note that:

> [B]y leaving the term 'burglary undefined, Congress intended it to have its common law meaning. "Burglary" therefore means the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit a felony therein.
> Chatman, supra at 527.

We would urge the Court to adopt the Ninth and Fourth Circuit interpretation of Section 924(e). We believe that these precedents most closely resemble the sentencing history of Petitioner. Therefore, we would argue that this result is the most just, equitable and results in applying 924(e) in the matter intended by Congress.

Although the United States and Petitioner agree that the questions raised by Petitioner's Writ of Certiorari are important and far-reaching, the United States argues that Certiorari should be

denied in this matter and granted in another where no written Intermediate Appeals opinion is available. Petitioner respectfully disagrees with the rationale and the conclusions of the Respondents. We argue that this matter presents the court with a unique opportunity to delineate the boundaries for application of Section 924(e) and to clear up the confusion surrounding the use of the statute. Defining both the quotient of "violence" necessary to violate the statute and the elements of burglary necessary to violate the statute are important to ensure equal application of Section 924(e) among the Circuits. We feel that the nature of Petitioner's offenses and the circumstances surrounding Petitioner's enhancement require

review because it is our sincere belief that this statute does not and should not encompass offenses of the nature committed by Petitioner.

Respondent's argue in their Brief in Opposition that the "broad statutory definition did not restrict 'burglary' offense to an archaic common law definition." See Brief for the United States in Opposition at 8. However, the definition cited by Respondent's in the Footnote to this argument also fails to encompass the activity upon which sentence enhancement was based in this case. Even if the Petitioner were to grant to the Respondent the applicability of the definition enumerated in Footnote 13, Petitioner would still fall outside the scope of Section 924(e) "burglary" as

defined in that Footnote, because one of Petitioner's supporting convictions was for a situation where Petitioner never gained entry to the warehouse. That offense would not even satisfy this "permissive" definition of criminal activity. Furthermore, by citing to legislative history arguments, rather than the text of the statute itself, the Respondent's seek to place a liberal interpretation on this statute which the principles of lenity and equity would not allow.

While we might concede that the 1986 Amendments to the Armed Career Criminals Act sought to broaden the application of the Act, the Amendments sought to broaden the application to other types of violent crimes and drug offenses, not to other

offenses which may or may not constitute burglary. The Amendments served to switch the focus or attention of the Act from violent burglary or robbery to encompass all violent crimes. While we would concede that this was the purpose and intent of the Amendments, we would not concede that these Amendments served to broaden the earlier Act's application to include nonviolent criminal activity. Indeed, we would argue that there was never any serious Congressional intent or support for this application of Section 924(e). Application of sentence enhancement is not appropriate in this matter because the past criminal activity upon which Petitioner's sentence enhancement was based does not contain the requisite criminal violence to

support sentencing under Section 924(e). While the legislative history does contain the opinions of some individuals who recommended an expansive application of Section 924(e), we believe that this statute covers only those violent offenses and violent criminals who present a threat to society.

We would further argue that Respondent's total reliance on legislative history and casual dismissal of the principle of lenity do not accurately mirror the opinions or precedent of this Honorable Court. The Supreme Court has long recognized that when Congress uses a common law term, such as burglary, without otherwise defining it, Congress is presumed to have adopted the meaning given that term at

common law. Morrissette v. United States, 342 U.S. 246, 263 (1952). When Respondent argues that reverting to use of common law definitions is not appropriate, they are in actuality arguing against the precedent of this Court, which has held that in those circumstances the only appropriate avenue was to revert to the common law definition.

Furthermore, the Respondent's reliance on legislative history is misplaced in this instance because the legislative history is inconclusive. History is cited in both the decisions which hold that the common law definition is appropriate and those which hold that it is not. Therefore, the final statute is and should suffice as embodying those

factors which Congress intended. As we have argued in our Petition for Certiorari, the intent of this Act was that it be applied against those who have committed violent or serious crimes, while not demeaning the seriousness of any criminal act, we do not believe that the past criminal activities of Petitioner, utilized to justify enhancement, are sufficiently criminal or violent in nature to sustain a Section 924(e) sentence enhancement. In allowing an overbroad application of Section 924(e) the Court would, in the end, undermine the statute's credibility and stymie its effectiveness.

While Respondent argues that the Court should heed "legislative history," Petitioner respectfully requests that the

Court heed statutory language. The legislative history on this matter is brimming with the testimony of District Attorney's from all over the United States concerning their opinions about this statute. While their opinions are no doubt important, they are nevertheless merely their personal opinions. The opinions of these District Attorney's and the opinions of the Bill Sponsor's cannot be said to be and should not be argued to comprise the opinions of all the members of Congress or the intent of Congressmen as a whole in passing this Bill. Therefore, this Court should not accept Respondent's arguments expressing same.

Respondent's cite to much of the legislative history concerning Section 924(e) in the body of their Brief in

Opposition. However, some of the passages which they have chosen echo the arguments made here by Petitioner. Even Representative Hughes, the Chairman of the House Subcommittee on Crime, indicated that this Act was intended to apply to someone beyond the caliber of the run-of-the-mill burglar. We contend that Leonard's convictions do not meet this test. His convictions for purpose of sentence enhancement are simply not of sufficient magnitude or violence. Furthermore, as Representative Hughes suggested, the drafters intended that this provision be applied against those career criminals who were apprehended while using a firearm during the commission of some other crime, when Petitioner was apprehended he was charged

solely with a violation of this Act. It appears clear that the Congressmen who adopted this legislation, and the men like Representative Hughes who worked on the committees which drafted it, did not intend for this Act to apply to less serious or nonviolent crimes. As Representative Hughes noted:

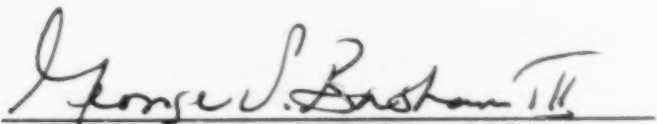
> We are talking about burglaries that probably are being carried out by an armed criminal, because the triggering mechanism is that they possess a weapon. That triggers Federal jurisdiction to begin with. So we are not talking about the average run-of-the-mill burglar necessarily, we are talking about somebody who also illegally possesses or has been transferred a firearm.
> Armed Career Criminal Legislation: hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 4 (1986) at 41.

CONCLUSION

For the foregoing reasons, as well as those which have been urged in the

Petition, Certiorari should be granted. We would request at this time that if this Court should determine that some other case is ripe for review construing Section 924(e), that this matter be consolidated for review with the case. [See Petitioner's Motion to Consolidate filed jointly with this Response Brief.]

Respectfully submitted,



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JULY 1989